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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961 1962

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Doyle Smith prays that a writ of certiorari issue to review the decision and order of the Supreme Court of Michigan, both entered on January 9, 1961, affirming the order of the Circuit Court of Wayne County that this cause be dismissed.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Wayne County is unreported and is printed in Appendix B hereto, *infra*, p. 15. The opinion of the Supreme Court of Michigan has not yet been officially reported, but is unofficially reported in 106 N.W.2d 785, and is printed in Appendix B hereto, *infra*. p. 28.

JURISDICTION

The opinion and order of the Supreme Court of Michigan were entered on January 9, 1961 (p. 41, *infra*). On April 7, 1961, Mr. Justice Stewart extended the time for filing petition for writ of certiorari to and including May 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(c), because a title, right, privilege or immunity was claimed under the Constitution or statutes of the United States, which claim was sustained by the Supreme Court of Michigan.

QUESTION PRESENTED

Whether a suit for damages for breach of a collective bargaining agreement may be maintained in a state court, when the conduct constituting the breach of contract is also an unfair labor practice under the National Labor Relations Act.

STATUTE INVOLVED

The statutory provisions involved are Section 7, Section 8(a)(1), Section 8(a)(3), and the first sentence of Section 10(a) of the National Labor Relations Act, as amended; and the first sentence of Section 203(d) and Section 301(a) of the Labor Management Relations Act, 1947, as amended; 61 Stat. 136 ff, 29 U.S.C. §§ 141 ff. These provisions are printed in Appendix A, *infra*, p. 12.

STATEMENT

This is an action at law to recover damages for breach of contract, filed in the Circuit Court of Wayne County, Michigan.

The second amended declaration alleged:

Plaintiff (petitioner here) and his assignors are and were employees of respondent, and are and were members of a labor organization, the Newspaper Guild of Detroit, here-

inafter called the Guild. (2a-3a.)[1] The Guild and respondent entered into successive collective bargaining agreements which provided, among other things, that (4a):

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

While these agreements were in effect a group of respondent's employees belonging to a union other than the Guild went on strike. (4a.) During this strike respondent permitted employees in certain departments, who were not covered by any collective bargaining agreement, to report on the premises, and paid them full wages, even though there was no work available. (4a-5a.) However, although petitioner and his assignors were ready to work during the strike respondent allowed only a few of them to enter the premises, and as a result petitioner and his assignors lost considerable money in wages. (4a-5a.) Respondent's refusal to pay full wages to petitioner and his assignors during the strike, while paying full wages to other employees, was in violation of the contract provisions set forth above. (5a.)

Respondent's answer denied certain of these allegations and asserted that "[t]he Court has no jurisdiction over the subject matter of this suit." (8a.)

How the Federal Question is Presented. At the opening of the trial respondent moved to dismiss for lack of jurisdiction on the following grounds (13a; p. 17, *infra*):

> "1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> "2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter."

---

[1] References followed by the letter "a" are to the printed Appellant's Appendix, which is part of the record certified by the Clerk of the Supreme Court of Michigan.

The parties stipulated, for purposes of the motion, that respondent, which publishes a newspaper, is engaged in commerce within the meaning of the National Labor Relations Act, as amended. (11a; pp. 15, 29-30, *infra*).

The trial court granted the motion to dismiss. It pointed out that the facts alleged, if true, constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, and held that (13a; p. 18, *infra*):

> "• • • This is an area which the federal government has preempted and placed in the exclusive control of the National Labor Relations Board."

The Supreme Court of Michigan affirmed. It held *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, to be controlling, and declared (p. 40, *infra*):

> "• • • Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress —that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices."

REASONS FOR GRANTING THE WRIT

1. This case presents an additional aspect of the issues before the Court in *Teamsters Local 174* v. *Lucas Flour Co.*, No. 716, certiorari granted April 3, 1961, and *Charles Dowd Box Co.* v. *Courtney*, No. 641, certiorari granted February 20, 1961, which have been set for argument together at the next Term. Review of this case in conjunction with those cases would aid the Court in its consideration of the various interrelated questions.

Teamsters Local 174 v. *Lucas Flour Co.*, No. 716, is a suit brought in a state court in Washington by an employer against a union for damages allegedly resulting from a strike. The Supreme Court of Washington ruled that the strike, which was in protest against the discharge of an

employee, was in violation of a collective bargaining agreement between the parties, although that agreement did not contain a no-strike clause; that the strike was neither prohibited nor protected activity under the National Labor Relations Act; and that under the decision of this Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, the NLRB therefore did not have exclusive primary jurisdiction, and the state courts did have jurisdiction.

Teamsters Local 174 and the present case differ in that in this case the parties agree that the conduct alleged to constitute a breach of contract would likewise constitute an unfair labor practice, while in *Teamsters Local 174* the state court held that the conduct found to constitute a breach of contract was neither protected nor prohibited activity under the federal Act, and the correctness of that ruling is challenged and is one of the issues before this Court. This distinction between the two cases appears to be without significance, however, as to whether the NLRB had exclusive primary jurisdiction, since the test the majority of this Court laid down in *Garmon* is whether the activity in question "is arguably subject" to the federal Act. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. Inasmuch as the activity involved in *Teamsters Local 174* appears to be at least "arguably subject" to the federal Act, the result in that case and the present should be the same, if the preemption doctrines laid down by this Court in *Garmon* and other cases are applicable at all to a suit for damages for breach of a collective bargaining agreement. To that extent the decisions of the Washington and Michigan Supreme Courts appear to be in conflict.

In any event a basic issue in both cases is whether the preemption doctrines heretofore articulated by this Court in equity actions and tort damage suits apply to suits for breach of collective bargaining agreements. This issue is

presented in this case isolated from the complicating factors which accompany it in *Teamsters Local 174*, so that review of this case would insure a clear-cut disposition of the issue.

This case also has inherent in it the issue which is before the Court in *Teamsters Local 174* v. *Lucas Flour Co.*, No. 716, and in *Charles Dowd Box Co.* v. *Courtney*, No. 641, with which it is set for argument. That issue is whether the jurisdiction conferred on the federal courts by Section 301 of the Taft-Hartley Act over suits for breach of collective bargaining agreements ousts state courts of jurisdiction over such suits. Resolution of that issue against state court jurisdiction would necessarily support the holding of the court below in the present case, even though the issue was not raised below.

2. The question whether the preemption doctrines heretofore laid down by this Court in equity actions and tort damage suits apply to suits for breach of collective bargaining agreements is an important issue which has not been, and should be, decided by the Court.

> "* * * there has not yet been a Supreme Court decision involving the jurisdiction of a court or arbitrator over acts constituting a contract violation as well as an unfair labor practice." Magruder, J., in *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F.2d 364, 367, 38 LRRM 2507, 2509 (1st Cir. 1956).

Alleged breaches of collective bargaining agreements give rise to several different categories of litigation, such as: (a) state court suits for damages for breach of contract; (b) state court actions for specific enforcement of the contract, including actions to compel arbitration or to enforce arbitration awards; (c) federal court suits under Section 301(a) of the Taft-Hartley Act for damages for breach of contract; and (d) federal court actions under Section 301

(a) for specific enforcement of the contract, including actions to compel arbitration or to enforce arbitration awards.

All of these types of litigation are likely to involve activity which "is arguably subject" to the National Labor Relations Act. This is particularly true of actions to compel arbitration or to enforce arbitration awards; there is, or up until now has been, a broad overlap between arbitration and the processes of the National Labor Relations Board, and numerous issues are regularly disposed of by arbitration which unquestionably fall also within the jurisdiction of the Board.

Far from holding that it has exclusive primary jurisdiction, the Board has welcomed the concurrent operation of the arbitration process. Thus, although the Board holds that it is not bound as a matter of law by an arbitration award, it will recognize and give effect to an award unless the award is at odds with the Act, or some other good reason appears for not recognizing it. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955). Further, in declining, in its discretion, to act on an unfair labor practice charge, the Board has taken into account the availability of an arbitral forum. *Crown Zellerbach Corp.*, 95 N.L.R.B. 753 (1961). See Note, 69 Harv. L. Rev. 725, 734-736 (1956).

This doctrine of the Board accords with the policy of the Taft-Hartley Act, Section 203(d) of which provides:

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *"

Pursuant to that policy it has become a common practice to provide in collective bargaining agreements that the employer will not discriminate because of union member-

ship or activity, and to arbitrate disputes arising over the application of such clauses. The Labor Arbitration Report series, published by the Bureau of National Affairs (which starts in 1946 but reports only a small fraction of all arbitration awards), lists in the Index Digest some 75 cases under the topic, "Discharge and Discipline—Union Activities" (Sec. 118.664). Many other cases are found in Section 4—"Interference with Organization and Discrimination against Union Members." See Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52, 59-64 (1957).

Moreover, the Labor Board has itself refused to interpret collective bargaining agreements even where the interpretation involves an unfair labor practice. Section 8(d) of the Act makes it an unfair labor practice (i.e., a refusal to bargain) for either party to a collective bargaining agreement to "terminate or modify such contract" unless certain prescribed notices are given and waiting periods observed. However, when the question whether one party or the other has undertaken to "terminate or modify" the contract turns on the interpretation of the contract, the Board refuses to entertain the case. In dismissing a case of this sort the Board said, *United Telephone Company of the West*, 112 N.L.R.B. 779, 781 (1955):

> "The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. • • • Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: '. . . it will not effectuate the statutory policy . . . for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act'."

The majority of courts have held that, when the same conduct may constitute both a breach of the collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of an action to enforce the contract. In *Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F.2d 467, 473 (5th Cir. 1958), *cert. denied*, 358 U.S. 880, the court declared:

> "The distinguishing point is that, while an act may be both an arbitrable contract violation and an unfair labor practice, a 'breach of contract is not an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decision, the latter leaves decision discretionary."

In accord are: *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F.2d 352, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959); *Operating Engineers, Local 715* v. *Gulf Oil Corp.*, 262 F.2d 80, 43 LRRM 2301 (5th Cir. 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401, 38 LRRM 2307 (3rd Cir. 1956); *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529, 533-534, 29 LRRM 2264, 2267 (4th Cir. 1951); *Carey* v. *Westinghouse Electric Corp.*, 178 N.Y.S.2d 846, 42 LRRM 2685 (N.Y. Sup. Ct. 1958); *Aaronson Bros. Paper Corp.* v. *Fishko*, 144 N.Y.S.2d 643, 24 LA 862 (N.Y. Sup. Ct. 1955), *aff'd*, 286 App. Div. 1009. *Contra*, and in accord with the decision below, are: *Local 774, IAM* v. *Cessna Aircraft Co.*, 341 P.2d 989, 44 LRRM 2533 (Kan. Sup. Ct. 1959); and *Swope* v. *Emerson Electric Mfg. Co.*, 303 S.W.2d 35, 40 LRRM 2074 (Mo. Sup. Ct. 1957).

It is true that in most of these cases the action to enforce the contract took the form of an action to compel arbitra-

tion, though three involved damages for breach of contract, i.e., *United Steelworkers, Local 4264* v. *New Park Mining Co.*, (10th Cir., jurisdiction upheld); *Textile Workers* v. *Arista Mills Co.*, (4th Cir., jurisdiction upheld); and *Local 774, IAM* v. *Cessna Aircraft Co.*, (Kan. Sup. Ct., jurisdiction denied). Also, Judge Magruder has suggested that, "[w]ith respect to arbitrators, as distinguished from courts, a narrower position concerning the preemption doctrine is possible." *United Electrical Workers, Local 259* v. *Worthington Corp.*, 236 F.2d 364, 367, 38 LRRM 2507, 2510 (1st Cir. 1956). And see Note, "Jurisdiction of Arbitrators and State Courts Over Conduct Constituting Both a Contract Violation and an Unfair Labor Practice," 69 Harv. L. Rev. 725, 736-737 (1956). However, the courts which have passed upon the point have usually not drawn any such distinction, but have simply asserted that, when the same conduct may constitute both a breach of a collective bargaining agreement and an unfair labor practice, the aggrieved party has the option of proceeding in court on the contract. See, *e.g.*, *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 273 F.2d 355, 357-358, 45 LRRM 2158, 2161 (10th Cir. 1959). The courts below in the present case did not suggest that a different result would have been reached had this proceeding been an action to compel arbitration instead of a suit for damages, though respondent argued that the two types of cases should be distinguished. In any event the matter is an important one which should be resolved by this Court.

It is also true that most of the decisions upholding court jurisdiction, where the breach of the collective bargaining agreement may also be an unfair labor practice, are federal decisions, with the weight of state authority apparently the other way. However, it is hard to see any distinction on

this point between federal and the state courts,[2] unless it is held that the jurisdiction conferred on the federal courts by Section 301 of the Taft-Hartley Act over suits for violation of collective bargaining agreements ousts state courts of jurisdiction over such suits. As noted, *supra*, p. 6, this latter issue is now before the Court in *Charles Dowd Box Co.* v. *Courtney*, No. 641, and is inherent in the present case, though not raised below.

CONCLUSION

For the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted, and that this case be set for argument together with Nos. 641 and 716.

Respectfully submitted,

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May 15, 1961

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[2] In *Garner* v. *Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 491, the Court declared:

> "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so."

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136 ff, 29 U.S.C. §§ 141 ff, are as follows:

• • • •

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the ap-

propriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (i) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

* * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

"FUNCTIONS OF THE SERVICE

"SEC. 203.

* * * *

"(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * * "

* * * *

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts be-

tween an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

STATE OF MICHIGAN

Circuit Court for the County of Wayne

DOYLE SMITH,

Plaintiff,

v.

EVENING NEWS ASSOCIATION,

a Michigan corporation,

Defendant.

OPINION ON MOTION OF DEFENDANT EVENING NEWS ASSOCIATION TO DISMISS FOR LACK OF JURISDICTION

(Filed February 1, 1960)

FACTS

Plaintiff, individually and as assignee of forty-nine others, brings this action in assumpsit claiming damages in the amount of $20,000.00 for breach of a collective bargaining agreement made between the defendant and Newspaper Guild of Detroit (herein called "the Guild").

Defendant is a Michigan corporation. It publishes a newspaper. The parties have agreed that it is engaged in interstate commerce.

Plaintiff and his assignors are all members of the Guild. They are also employees of defendant. Those members of the Guild who were employed by defendant were janitors, elevator operators and watchmen.

On December 1, 1955, and continuing until January 16, 1956, a group of employees of the defendant belonging to a union other than the Guild were on strike against defendant. Plaintiff claims that while the strike was in progress defendant permitted unorganized employees working in its editorial, business and advertising departments to report at defendant's premises and paid them their full wages. Plaintiff also claims he and those who assigned their claims to him (i.e., Guild members) were ready, able and available for work during the strike but only a few were allowed to enter the struck premises and to work with the result that they lost considerable money in wages. Plaintiff further claims the refusal to pay full wages to Guild members plus the payment of full wages to the unorganized employees constituted discrimination against Guild members because of their membership. This he says was not only a discrimination but it is also a breach of the following convenant in the contract between the Guild and the defendant:

> "There shall be no discrimination against any employee because of his membership or activity in the Guild."

Defendant denies discrimination and partiality. It says that employees were retained in accordance with the need for their services and not with reference to any membership in the Guild or any other organization; that certain aspects of the business had to be carried on at full strength and in fact at more than usual strength by reason of the strike and in spite of it; that news had to be gathered and preserved; that money had to be received and disbursed; that advertising contracts had to be serviced and that some of these activities were even increased by the strike rather than diminished.

This Court, if it proceeded to a trial on the merits, would be required to determine whether or not plaintiff and his assignees were discriminated against, by reason of their

Guild membership, when defendant employed on a full-time basis and paid its unorganized employees but did not do the same for all those employees who were Guild members. Such discrimination, if found to exist, would constitute an unfair labor practice under Section 8(a) of the National Labor Relations Act, as amended (herein called "the Act").

Plaintiff, and each of his assignees, failed to file a charge with the National Labor Relations Board within the six-month period contemplated in the Act. Had a charge been filed and a complaint been issued under the Act, the Board would have had the right on proper findings—not only to reinstate but also to award back pay. (Section 10(c)). However, since plaintiff and his assignees failed to file a charge no complaint can now be issued under the Act. (Section 10(b) of the Act.) Instead of filing a charge, in October of 1956—more than six months after the conclusion of the strike and the events above mentioned—plaintiff commenced this suit at law.

Defendant plead that the Court has no jurisdiction over the subject matter of the suit. This defense was based upon the claim that the subject had been preempted by the Labor-Management Relations Act, 1947, as amended (i.e., the Act). At the opening of the trial, defendant moved to dismiss for lack of jurisdiction on the following grounds:

> 1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and
>
> 2. The National Labor Relations Board has been vested by virtue of such amended Act with exclusive jurisdiction of the subject matter.

The issue this Court is now called upon to decide, by reason of defendant's defense and motion, can be stated as follows:

> Does a state court have jurisdiction of an action at law by an employee against his employer for breach of

contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true constitute both a breach of such contract and also an unfair labor practice under the provisions of Section 8(a) of the Act?

OPINION

Plaintiffs have charged defendant with committing what constitutes a statutory unfair labor practice of discriminating against them by reason of their union membership. This is an area which the federal government has preempted and placed in the exclusive control of the National Labor Relations Board.

More than twelve years ago, before the United States Supreme Court had considered the subject, the Circuit Court of Appeals for the 4th Circuit, in *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, concluded that recompense of lost wages on account of an unfair labor practice is a matter for the labor board.

Plaintiff in this case is attempting to circumvent the exclusive remedy afforded him in the Act by declaring on the contract. It seems that he should be unable to succeed. The case of *Garner* v. *Teamsters Union*, 346 U.S. 485, 98 L. Ed. 228 (1953), held that the National Labor Relations Board has exclusive jurisdiction of unfair labor practices. In that case the plaintiff had 24 employees, four of whom were members of defendant union. Defendant engaged in what was an unfair labor practice under the Act. It placed pickets, none of whom were employees of plaintiff, at plaintiff's loading platform to induce and coerce plaintiff's employees to join the union. Drivers from other unions refused to cross the picket line, as a result of which plaintiff's business fell off as much as 95 per cent. The Supreme Court of the United States stated that this was a matter for the National Labor Relations Board, not for the state courts.

and that the need for uniformity in applying the Act necessitated centralized administration in one body. Thus the state and federal courts are preempted from deciding unfair labor practices. The Court also discussed the importance of public and private rights, saying at page 500:

> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded."

See also *Grimes & Hauer, Inc.* v. *Pollack, et al.*, 127 N.E. 203 (1955) holding, among other things, that both public and private rights are comprehended in the Act. The *Garner* case has been followed extensively and is considered to be the leading case on the preemption doctrine as it applies to unfair labor practices.

Weber, et al. v. *Anheuser-Busch, Inc.*, 384 U.S. 468, 99 L. Ed. 546 (1955) affirmed the *Garner* case. In that case the union struck and picketed an employer's plant to compel the employer to insert into a contemplated collective bargaining contract a clause obligating the employer to employ, for repair or replacement of machinery, only contractors who had collective bargaining agreements with that union. Employer filed charges of unfair labor practices under Section 8(b), (4), (D) of the Act. The National Labor Relations Board quashed notice of the hearing, holding that no "dispute" existed within the meaning of that subsection. Before the Board acted, the employer sought an injunction against the union in a Missouri state court alleging a secondary boycott and also a violation of Subsections (A), (B) and (D) of 8(b) (4) of the Act. A permanent injunction was

issued by the State Court after the Board found no violation of Section 8(b), (4), (D). Upon certiorari to the Supreme Court of the United States, that Court said in part:

> "A state may not enjoy, under its own labor statute, conduct which has been made an 'unfair labor practice' under the federal statutes. Such was the holding in the Garner case (U.S.), *supra*. The Court pointed out that exclusive jurisdiction to pass on the union's picketing is delegated by the Taft-Hartley Act to the National Labor Relations Board."

Then, after finding that the Board had not ruled that no unfair labor practice was involved but only that there was no violation of subsection (D) of Section 8(b), (4), the Court said, at page 479:

> "Respondent itself alleged that the union conduct it was seeking to stop came within the prohibitions of the federal act, and yet it disregarded the Board and obtained relief from a State Court. It is perfectly clear that had respondent gone first to a Federal Court, instead of the State Court, the Federal Court would have declined jurisdiction, at least as to the unfair labor practices on the ground that exclusive primary jurisdiction was in the Board. As pointed out in the Garner case, the same considerations apply to the State Courts."

And, at page 481:

> "But where the moving party itself alleges unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices, and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that Act, the State Court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

In harmony with these decisions, certain other cases should specifically be mentioned. The case of *Swope* v.

Emerson Electric Mfg. Co., 303 S.W.2d 35 (1957) (Certiorari denied in 355 U.S. 894), was an action to recover damages upon the theory that the employer and others had conspired to discharge plaintiffs because of union activities and in breach of their employment contract. The gist of the plaintiff's allegations was a charge of an unfair labor practice (i.e., a discrimination on account of union activities) and the damages sought were the loss of wages. The Court pointed out that with few exceptions—such as common law torts accompanied by violence—the clear import of the federal cases now is that state courts may not exercise jurisdiction as to those matters constituting unfair labor practices under the federal act. The Court held that exclusive jurisdiction was vested in the National Labor Relations Board and dismissed the case.

In *United Electrical, Radio and Machine Workers of America, et al.* v. *General Electric Co.*, D.D. 231 F.2d 259 (1956), a union and one of its members sought injunctive relief and damages for breach of contract due to the discharge of plaintiff because he had invoked the Fifth Amendment, which is in effect saying the Company committed an unfair labor practice. The Court followed the *Garner* decision, dismissing for lack of jurisdiction, and again made it clear that jurisdiction is vested in the National Labor Relations Board. The Court also said, at page 261, footnote 1:

> "The circumstance that the facts alleged in the present complaint, constituting an unfair labor practice, are in the nature of a breach of contract and not, like the facts in the Garner case, in the nature of a tort, would not authorize the District Court or this court to create an exception to the Garner rule and assert jurisdiction before the Board has been asked to exercise it."

The doctrines of these cases seem to have been followed almost without exception and have left little doubt as to the

exclusive nature of federal (as distinguished from state) jurisdiction over unfair labor practices. See also *Bert Mfg. Co.* v. *Local 810*, 136 N.Y.S.2d 805 (1954); *Bearden* v. *Coker*, 291 S.W.2d 790 (1956); *Leiter Mfg. Co.* v. *International Ladies Garment Workers Union, AFL*, 269 S.W.2d 409 (1954); *T&C Motors* v. *Local Union No. 328*, 355 Mich. 26; *Davidson* v. *Carpenters Council*, 356 Mich. 557; *Guss* v. *Utah*, 353 U.S. 1; *Amalgamated* v. *Fairlawn*, 353 U.S. 20; *San Diego* v. *Gormon*, 353 U.S. 26. See also the recent case of Grand Lodge v. *Cessna*, 341 Pac. 2d 989, in which an injunction was sought in the Kansas court to enjoin the violation of a collective bargaining contract expressly prohibiting "discrimination—for engaging in—union activity" and in which case the Court, in dismissing the complaint for lack of jurisdiction over the subject matter, because of preemption, reviewed the decisions and said: *"that a plaintiff may not characterize an action which constitutes an unfair labor practice as a 'contract violation' and thereby circumvent the plain mandate of Congress that jurisdiction of such matters be vested exclusively in the National Labor Relations Board."*

If the case at bar involved merely a breach of contract, without an unfair labor practice, and was instituted by the union in a federal district court, then a suit could be successfully prosecuted from a jurisdictional standpoint, at least in a federal court. (See *UAW, Local 286* v. *Wilson Athletic Goods Mfg. Co., Inc.* (N.D.), 119 F. Supp 948 (1950). Such, however, is not the case here. Plaintiff is suing as an individual, in a state court, for breach of contract involving an unfair labor practice, and is seeking back wages, a remedy which the National Labor Relations Board is empowered to grant under Section 10(c).

The only apparent exceptions to the presently strict preemption doctrine seem to arise in cases involving violent

torts and in cases where an employee is suing the union for reinstatement. Courts allow suits in the state courts in three tortious situations: (1) Mass picketing; (2) Violence; (3) Overt threats of violence. The reason given in these cases is that it is necessary, under the state police power, to preserve the peace, safety, etc., of the state. If parties were required to wait until the National Labor Relations Board found an unfair labor practice before issuing its order, the violence, intimidation, etc., would mushroom entirely uncontrolled. Thus an exception has been made in cases where violence is involved. See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 98 L. Ed. 1025 (1954); *United Automobile, Aircraft and Agricultural Implement Workers* v. *Wisconsin Employment Relations Board*, 351 U.S. 266 (1956); *Johnston, et al* v. *Colonial Provision Co., Inc.* (Mass.), 128 F. Supp. 954 (1954), and *UAW* v. *Russell*, 356 U.S. 634.

Counsel for plaintiff seems to rely heavily upon the *Russell* case as standing for the proposition that a state court has jurisdiction of an action by an employee against an employer for breach of a collective bargaining contract which also involves an unfair labor practice. The *Russell* case is merely another example of a situation involving violence. In this case the plaintiff was forcibly prevented from crossing a picket line. Plaintiff brought an action for the tort of wrongful interference with a lawful occupation. The Court carefully confined its opinion to situations involving violence, threats thereof, or mass picketing and referred to the *Laburnum* case.

The second exception arises in cases where a union member sues his union for restoration of his membership and or damages due to illegal expulsion. In *Real* v. *Curran*, 138 N.Y.S. 2d 869 (1955), the plaintiff sued the union in a state court for reinstatement and for a declaration that his

expulsion was void. His expulsion was due to a conviction of a narcotics charge fifteen years prior to his union membership. The Court held that although the National Labor Relations Board must determine the question of an unfair labor practice, state courts are not precluded from restoring membership to a wrongfully expelled member of the union. In *I.A.M.* v. *Gonzales*, 42 LRRM 2135, 356 U. S. 617 (1958), the second case on which counsel for the plaintiff so heavily relies, the state court allowed a suit by an expelled union member against his union for restoration of his membership and for damages due to his illegal expulsion. Again the Court specifically limited its decision to this type of factual situation and to suits between a union and one of its members. Mr. Justice Frankfurter took pains to point out that this was not a suit to remedy employer discrimination. He said, at page 2137:

> "The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at is an unfair labor practice under Section 8(b)(2). * * * A state court decision requiring restoration of membership requires consideration of a judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership."

The above mentioned cases are the only apparent exceptions to the strict preemption doctrine as it is applied to unfair labor practices. The case at bar falls into neither category.

Plaintiff cites several other cases which, upon analysis, are found to be quite different from and not controlling of the issues involved in, the case at bar. For example, the following, most of which also arose prior to the teachings in the United States Supreme Court cases of *Garner* and *Weber, et al., supra:*

(1) *Textile Workers Union* v. *Arista Mills*, 193 F.2d 529 (CCA, 4th Cir. 1951). This was an action under Section 301(a) of the Act involving a dispute between *a union and an employer in a federal court*. The suit was for breach of a collective bargaining agreement. The relief asked was declaratory judgment, an injunction and damages. The dispute involved *reinstatement and seniority provisions* of a contract. The Court held for the union but not on jurisdictional grounds, saying, at page 533:

> "We do not mean to say that merely because a bargaining contract may forbid unfair labor practices, courts have jurisdiction to afford relief against them under the guise of relieving against breaches of contract * * *"
>
> "We think it clear that parties may not by including a provision against unfair labor practices in a bargaining agreement vest in the courts jurisdiction to deal with matters which Congress has placed within the exclusive jurisdiction of the N.L.R.B. Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute an unfair labor practice within the meaning of this act."

In this case there was also a complaint filed with the National Labor Relations Board, a procedure absent, and vitally so, in the case at bar. This case was decided before the *Garner* case and without benefit of that opinion.

(2) *Reed* v. *Farwick*, D. C., 86 F. Supp. 822 (1949), also decided before the *Garner* case and also a suit in a federal court under Section 301(a) of the Act. In this case the individual plaintiffs were dropped as parties by agreement because of Section 301(a), thus meeting the requirements of that section. This case was a suit charging an unfair labor practice of refusing to bargain collectively and the act of

encouraging the organization of rival unions on the premises. The Court separated the unfair labor practice from the contract portion and took jurisdiction of the latter while declining to do so in reference to the unfair labor practice charge.

(3) *Modine Mfg. Co.* v. *I.A.M.*, 217 F.2d 326 (CCA 6th Circuit, 1954). Again a suit in a federal court under Section 301(a) by a labor union against an employer.

(4) *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45. This too is a suit between an employer and a union in the federal court under Section 301(a) of the Act.

(5) *United Telephone Co. of the West and United Utilities*, 112 NLRB 779. This case is a Board decision and it did not deal with a preemption problem.

By failing to invoke the proper procedure of filing a charge with the National Labor Relations Board within the six-month statutory period, by charging facts which are both an unfair labor practice as well as a contract violation, and by bringing this action in a state court, plaintiff is precluded from recovery in the instant case. The National Labor Relations Board had the power to award back pay even if there is no discharge and reinstatement problem. See Sec. 10(c). Furthermore, no specialized damages have been asked which the National Labor Relations Board would have been powerless to give. The need for uniformity in applying the provisions of the labor-Management Relations Act still prevails over the argument that state courts should entertain suits in situations of the type present in this case. The facts, as presented, do not require immediate action as is so often the case where violent torts have been threatened or committed. Finally, in order to allow recovery on the contract, this Court would be required to find discrimination of a kind which would also be an unfair labor

practice and thus subject to correction by the National Labor Relations Board.

In view of the cases cited in this opinion, defendant's motion to dismiss for lack of jurisdiction should be granted. An order may be entered consistent with the opinion.

MILES N. CULEHAN,
Circuit Judge.

ORDER OF DISMISSAL

(Filed February 11, 1960)

At a session of said Court, held in the City-County Building, City of Detroit, Wayne County, Michigan, this 11th day of February, A.D. 1960.

Present: Honorable Miles N. Culehan, Circuit Judge.

This Court, having considered the oral arguments in open court and the written briefs submitted by counsel for both parties on defendant's Motion to Dismiss, and having concluded that this Court lacks jurisdiction;

Now, Therefore, It Is Ordered that this cause be and the same hereby is dismissed.

MILES N. CULEHAN,
Circuit Judge.

STATE OF MICHIGAN

Supreme Court

DOYLE SMITH,

Plaintiff and Appellant.

v.

EVENING NEWS ASSOCIATION,
a Michigan corporation,
Defendant and Appellee.

BEFORE THE ENTIRE COURT
KAVANAGH, J.

Plaintiff and his assignors are employees of defendant Evening News Association and are members of a labor organization, the Newspaper Guild of Detroit. The Guild had a collective bargaining agreement with defendant which provided, among other things:

"There shall be no discrimination against any employee because of his membership or activity in the Guild." A group of employees of defendant belonging to a union other than the Guild went on strike. Defendant permitted employees of the editorial department, business office and advertising department, who were not covered by a collective bargaining agreement, to report on the premises and they were paid full wages even though there was no work available.

Plaintiff and his assignors were willing to work but defendant permitted only a few to work and as a result, plaintiff and his assignors lost considerable money in wages.

Plaintiff contends that defendant's refusal to pay full wages to plaintiff and his assignors and defendant's payment of full wages to other employees constituted dis-

crimination against an employee because of his membership or activity in the Guild and, therefore, was a violation of the contract provision above quoted.

Plaintiff brought this action in the circuit court for the county of Wayne to recover damages for such breach.

Defendant moved to dismiss for lack of jurisdiction on the following grounds:

"1. Defendant is charged with acts which, if true, constitute an unfair labor practice as defined in the National Labor Relations Act, as amended, and

"2. The National Labor Relations Board has been vested by virtue of such amended act with exclusive jurisdiction of the subject matter."

The trial judge granted the motion to dismiss for lack of jurisdiction on the theory that Congress in adopting the National Labor Relations Act had pre-empted the field and placed the question of a statutory unfair labor practice exclusively within the control and jurisdiction of the National Labor Relations Board.

Plaintiff appeals, and we are presented with the following question:

Does a State court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon facts which if true would constitute both a breach of such contract and an unfair labor practice under the provisions of section 8(a) of the National Labor Relations Act as amended?

For the purpose of the decision on this particular motion to dismiss it was stipulated that defendant was engaged in commerce within the meaning of the National Labor Rela-

tions Act as amended. It should be further noted that plaintiff failed to bring a complaint to the Board under the unfair labor practices provisions of the National Labor Relations Act until after the expiration of the statutory period provided for the bringing of such complaint.

Plaintiff argues that under the decisions of the United States supreme court Congress has not pre-empted the entire labor field. He contends there are numerous exceptions to the rule. He argues that the case of *Garner* v. *Teamsters Union*, 346 U.S. 485, stands only for the proposition that peaceful picketing of the premises of an employer engaged in commerce may not be enjoined by a State court. He points out as an exception to the general rule that in the case of *United Workers* v. *Laburnum Corp.*, 347 U.S. 656, where plaintiff sought damages in a State court from a union for engaging in coercive conduct, which conduct was also an unfair labor practice, the United States supreme court affirmed the right of plaintiff to damages against the union on the theory that Congress, in the National Labor Relations Act, had not provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. Plaintiff refers to the case of *United Automobile Workers* v. *Russell*, 356 U.S. 634, where the United States supreme court did not deprive the Alabama State court of jurisdiction where it had allowed an employee to recover damages from a union even where the union's conduct constituted an unfair labor practice and the National Labor Relations Board had jurisdiction to award back pay to the employee. Plaintiff calls particular attention to the fact that in the Russell Case the court indicated there are cases in which there is a possibility that both the Board and the State court have jurisdiction to award lost pay.

Plaintiff contends this is simply an action for damages

for breach of contract. He claims State courts have traditional and statutory jurisdiction to grant such relief.

Defendant, on the other hand, relying upon almost the same cases, contends that they hold that preemption exists limiting the jurisdiction of State courts in an action for damages for breach of contract when such action also constitutes an unfair labor practice.

Section 8(a) of the National Labor Relations Act provides in part as follows:

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 • • • (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization • • •."

Section 10(c) of the act provides in part as follows:

> "If upon the preponderance of the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this act • • •."

Whether plaintiff can maintain his action in the State court is entirely dependent upon whether Congress preempted the field as to this kind of action and vested exclusive jurisdiction in the National Labor Relations Board. This is, to say the least, a difficult question.

The United States supreme court itself has found difficulty in reconciling the effect and meaning of its decisions on this field of law. It seems we must start with the general premise that Congress has pre-empted the field in

labor relations matters affecting interstate commerce and has vested exclusive jurisdiction in the National Labor Relations Board to determine such labor disputes where labor practices are either prohibited or protected by the Labor Management Relations Act.

In determining whether this is always true we turn to the latest available position on this subject—the discussion in San Diego Building Trades Council v. Garmon, 359 US 236. There, the respondents, copartners in the business of selling lumber in California, began an action in the superior court for the county of San Diego asking for an injunction and damages. The unions sought from respondents an agreement to retain in their employ only those workers who were already members of the union or who applied for membership within 30 days. Respondents refused until one of the unions had been designated as the collective bargaining agent. The unions began at once peacefully picketing respondents' place of business and exerting presure on customers and suppliers in order to persuade them to stop dealing with respondents. The trial court found that the sole purpose of these pressures was to compel execution of the proposed contract. The unions protested this finding, claiming the purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement. The court also awarded $1,000 damages for losses found to have been sustained. The United States supreme court granted certiorari and decided the matter along with Guss v. Utah Labor Relations Board, 353 US 1, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 US 20, holding that the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating. In vacating and remanding

the judgment of the California court (353 US 26) the United States supreme court pointed out that the Guss and Fairlawn cases involved relief of an equitable nature and controlled the injunctive question, but remanded to the State court the question of whether the judgment for damages would be sustained under California law. On remand, the State court sustained the award of damages. The California court relied on general tort provisions of the California an unfair labor practice under State law. In so holding, the count relied on general tort provisions of the California civil code as well as State enactments dealing specifically with labor relations. The United States supreme court again granted certiorari. Justice Frankfurter delivered the opinion of the Court. After pointing out the difficult situation presented to that court in construing the National Labor Relations Act, he said (p 240):

> "This court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent by the judicial process."

He then discussed all the earlier cases on this subject and concluded by saying (pp 244-246):

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by section 7 of the National Labor Relations Act, or constitute an unfair labor practice under section 8 due regard for the federal enactment requires that State jurisdiction must yield. To leave the States free to regulate conduct so placed within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically di-

rected towards the governance of industrial relations.[3] Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

"At times it has not been clear whether the particular activity regulated by the States was governed by section 7 or section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this court's authority cannot remain within a State's power and State jurisdiction too must yield to the exclusive primary competence of the board. See, e.g., *Garner* v. *Teamsters Union*, 346 US 485, especially at 489-491; *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468.

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to section 7 or section 8 of the act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the

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[3] See *Weber* v. *Anheuser-Busch, Inc.*, 348 US 468, in which it was pointed out that the State court had relied on a general restraint of trade statute. Cf. *Auto Workers* v. *Wisconsin Board*, 351 US 266. The case before us involves both tort law of general application and specialized labor relations statutes.

Board decides, subject to appropriate federal judicial review, that conduct is protected by section 7, or prohibited by section 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States.[4] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the general counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to State jurisdiction. The withdrawal of this narrow area from possible State activity follows from our decisions in Weber and Guss. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

"In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State

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"[4] See *Auto Workers v. Wisconsin Board*, 336 US 245. The approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

"[5] When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . .' *Charleston & West Carolina R. Co. v. Varnville Furniture Co.*, 237 US 597, 604."

of California seeks to give a remedy in damages, and since such activity is arguably within the compass of section 7 or section 8 of the act, the State's jurisdiction is displaced.

Justice Frankfurter went on to say (pp 247-248):

"It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 US 634; *United Construction Workers* v. *Laburnum Corp.*, 347 US 656. We have also allowed the States to enjoin such conduct. *Youngdahl* v. *Rainfair*, 355 US 131; *Auto Workers* v. *Wisconsin Board*, 351 US 266. State jurisdiction has prevailed in these situations because the compelling State interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. We recognize that the opinion in *United Construction Workers* v *Laburnum Corp.*, 347 US 656, found support in the fact that the State remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e., 'intimidation and threats of violence.'"

Justice Harlan, writing a concurring opinion in the same case, in discussing the majority opinion said (pp 250-254):

"The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all State power. *Hill* v. *Florida*, 325 US 538; *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Motor Coach Employees* v. *Wisconsin Board*, 340 US 383. That threshold question was squarely faced in the *Russell* case, where the court, at page 640, said: 'At the outset, we note that the union's activity in this case clearly was not protected by federal law.' The same question was, in my view, necessarily faced in *Laburnum*.

"In both cases it was possible to decide that question without prior reference to the National Labor Relations Board because the union conduct involved was violent, and as such was of course not protected by the federal act. Thus in *Laburnum*, the pre-emption issue was limited to the 'type of conduct' before the court. 347 US, at 658. Similarly in *Russell*, which was decided on *Laburnum* principles, the court stated that the union's activity 'clearly was not protected,' and immediately went on to say (citing prior 'violence cases'[1]) that 'the strike was conducted in such a manner that it could have been enjoined' by the State. 356 US, at 640. In both instances the court, in reliance on former 'violence' cases involving injunctions,[2] might have gone on to hold, as the court now in effect says it did, that the State police power was not displaced by the federal act, and thus disposed of the cases on the ground that State damage awards like State injunctions, based on violent conduct did not conflict with the federal statute. The court did not do this, however.

"Instead the relevance of violence was manifestly deemed confined to rendering the *Laburnum* and *Russell* activities federally unprotected. So rendered, they could then only have been classified as prohibited or 'neither protected nor prohibited.' If the latter, state jurisdiction was beyond challenge. *Automobile Workers* v. *Wisconsin Board*, 336 US 245. Conversely, if the activities could have been considered prohibited, primary decision by the board would have been necessary, if State damage awards were inconsistent with federal prohibitions. *Garner* v. *Teamsters Union*, 346 US 485. To determine the need for initial reference to the board, the court assumed that the activities were unfair labor practices prohibited by the federal act. *Laburnum, supra*, at 660-663; *Russell, supra*, at 641. It then considered the possibility of conflict and held that the State damage remedies were not pre-empted because the federal act afforded no remedy at all for the past conduct involved in *Laburnum*, and less than full

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"[1] *Youngdahl* v. *Rainfair, Inc.*, 355 US 131; *Automobile Workers* v. *Wisconsin Board*, 351 US 266.

"[2] See *Allen-Bradley Local* v. *Wisconsin Board*, 315 US 740.

redress for that involved in *Russell*. The essence of the court's holding, which made resort to primary jurisdiction unnecessary, is contained in the following passage from the opinion in *Laburnum*, *supra*, at 665 (also quoted in *Russell*, *supra*, at 644):

> "'To the extent that congress prescribed preventive procedure against unfair labor practices, that case [*Garner* v. *Teamster Union*, *supra*,] recognized that the act excluded conflicting State procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between State and federal administrative remedies in that case was itself, a recognition that if no conflict had existed, the State procedure would have survived.'

"Until today this holding of *Laburnum* has been recognized by subsequent cases. See *Weber* v. *Anheuser-Busch Inc.*, 348 US 468, 477; *Automobile Workers* v. *Russell*, *supra*, at 640, 641, 644; *International Assn. of Machinists* v. *Gonzales*, 356 US 617, 621, similarly characterizing *Russell*; see also the dissenting opinion in *Gonzales*, especially at 624-626.[4]

"The court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable board delays, may

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"[4] The same view is taken of *Laburnum* and *Russell* in the *amici* briefs filed in the present case by the government and the American Federation of Labor and Congress of Industrial Organizations, the latter stating that '[w]e hope to argue in an appropriate case that the *Russell* decision should be overruled.'

render State redress ineffective. And in instances in which the board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the board does accept jurisdiction.

"I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the court's intimation that the States may even be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal act. Surely that suggestion is foreclosed by *Automobile Workers* v. *Wisconsin Board*, 336 US, *supra*,[5] as well as by the approach taken to federal pre-emption in such cases as *Allen-Bradley Local* v. *Wisconsin Board*, supra, *Bethlemen Steel Co.* v. *New York Board*, 330 US 767, 773, and *Algoma Plywood Co.* v. *Wisconsin Board*, 336 US 301; not to mention *Laburnum* and *Russell* and the primary jurisdiction doctrine itself.[6] Should what the court now intimates ever come to pass, then indeed State power to redress wrongful acts in the labor field will be reduced to the vanishing point.

"In determining pre-emption in any given labor case, I would adhere to the *Laburnum* and *Russell* distinction

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"[5] The court may be correct in stating that 'the approach taken in that case, in which the court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary; that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell*.

"[6] If the 'neither protected nor prohibited' category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Assn. of Machinists* v. *Gonzales*, 356 US 617."

between damages and injunctions and to the principle that State power is not precluded where the challenged conduct is neither protected nor prohibited under the federal act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision.

There can be no question from the concurring opinion of Justice Harlan that he believed the majority opinion had limited the State power to redress wrongful acts in the labor field to the vanishing point, whether the acts were federally prohibited or federally protected. It is equally evident that Justice Harlan and those who concurred in his opinion believed that, where it is fairly debatable whether the conduct involved is federally protected, Congress has pre-empted the field so as to prevent State action.

The question in the instant case, then, is whether the alleged discrimination on the part of defendant-appellee would constitute an unfair labor practice under the National Labor Relations Act, particularly under sections 7 or 8 thereof. It is agreed for the purpose of this case that the action alleged as constituting a breach of contract would also constitute an unfair labor practice. Plaintiff may not characterize an act which constitutes an unfair labor practice as a contract violation and thereby circumvent the plain mandate of Congress—that jurisdiction of such matters be vested in the National Labor Relations Board and that Federal and State trial courts are without jurisdiction to redress by injunction or otherwise unfair labor practices. If the rule were otherwise, then Federal and State courts could assume jurisdiction over all types of unfair labor practices under the guise of enforcing the terms of the collective bargaining agreement, provided the agreement contains terms governing such matters, and thereby circumvent the plain mandate of Congress.

In the instant case the damages would appear to be the

loss of wages. The National Labor Relations Board under section 10(c) of the act has adequate authority to adjust the wrong by requiring the payment of back wages.

Since it is, to say the least, fairly debatable whether the conduct here involved is federally protected, then under both the majority and concurring opinions of *Garmon*, the judgment of the trial court must be affirmed. Defendant shall have costs.

Stamped filed: Jan. 9, 1961
Donald F. Winters,
Clerk Supreme Court.

Signed: Thomas M. Kavanagh
Eugene F. Black
Harry F. Kelly
John R. Dethmers
Leland W. Carr
Talbot Smith
George Edwards
Theodore Souris

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and sixty-one.

Present the Honorable

John R. Dethmers,
Chief Justice
Leland W. Carr,
Harry F. Kelly,
Talbot Smith
Eugene F. Black,
George Edwards,
Thomas M. Kavanagh,
Theodore Souris,
Associate Justices.

Doyle Smith,

Plaintiff and Appellant,

vs 48675

Evening News Association,

Defendant.

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is NO ERROR, Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiff its costs, to be taxed, and that it have execution therefor.